

In the
Supreme Court of Missouri

State ex rel. RYAN AMORINE,

Relator,

v.

THE HONORABLE KELLY PARKER,

Respondent.

On a Writ of Prohibition to the Supreme Court of Missouri
From the Fifteenth Judicial Circuit
The Honorable Kelly Parker, Judge

RESPONDENT'S BRIEF

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SUMMARY OF THE ARGUMENT

This case presents the question of when earned compliance credits may accrue under §217.703 RSMo. (Supp. 2012).

Relator Ryan Amorine seeks a writ of prohibition to prevent Respondent from conducting a revocation hearing because Amorine believes his probation term has expired based on his calculation of earned compliance credits under §217.703 RSMo. (Supp. 2012).

Respondent contends that Amorine's earned compliance credits, as he claims them, were not calculated in compliance with §217.703.5 RSMo., and as a result Amorine's probation term has not yet expired. Specifically, Amorine was not eligible for earned compliance credits from June 2013, when the initial probation violation report was submitted to the probation court, until after September 2014, when a hearing was held on the violation and Respondent found that Amorine violated his conditions.

STATEMENT OF FACTS

On May 4, 2011, Amoline pleaded guilty to possession of a controlled substance and second-degree domestic assault in the Circuit Court of Crawford County. (Pet. Ex. A). The Honorable Sanborn Ball suspended the imposition of Amoline's sentences and placed him on a five-year term of supervised probation. (*Id.* at 1). The court imposed special conditions that required Amoline to complete community service and to pay court costs. (Resp. Ex. 1).

Two years later, in June 2013, Amoline's probation officer filed a violation report because Amoline failed to pay court costs and failed to complete his forty hours of community service. (Resp. Ex. 2). In January 2014, a payment plan was created to assist Amoline to comply with his special probation conditions. (Pet. Ex. A at 3). However, he failed to comply with the plan and continued to violate his probation conditions.

The Honorable Kelly Parker ("Respondent") was assigned Amoline's case on May 27, 2014. (Pet. Ex. A at 3). Respondent set the matter for a case review on July 16, 2014 and directed Amoline to appear. (*Id.*). Before the case review occurred, on May 28 2014, a second violation report was filed. (*Id.* at 4); (Resp. Ex. 2). The report stated that Amoline had been "reminded on numerous occasions" that he was required to complete his community service

in April 2014 and have his court costs paid in full by April 2014, but he failed to do so. (Resp. Ex. 2).

At the July 16, 2014 case review, Respondent entered an order suspending Amoline's probation term and passed the matter until September 16, 2014 for the setting of a probation revocation hearing. (Pet. Ex. A at 4).

On September 16, 2014, Respondent held a hearing on Amoline's violations. (*Id.* at 4; Pet. Ex. B). Amoline admitted violating the special conditions of his probation. (Pet. Ex. A at 4). After giving Amoline notice and an opportunity to be heard, Respondent found that Amoline violated the terms of his probation by failing to pay court costs. (Pet. Ex. B). Instead of revoking Amoline's probation, Respondent extended Amoline's probation term for one additional year. (*Id.*). Respondent lifted the suspension order and reinstated the probation term. (Pet. Ex. A at 4); (Pet. Ex. B).

Four months later, in January 2015, the probation officer filed a third violation report, alleging that Amoline failed to pay court costs and did not complete his community service in violation of his special conditions. (Pet. Ex. D). Respondent scheduled a case review on February 17, 2015 and directed Amoline to appear. (Pet. Ex. A at 4). Respondent continued the case review until March 17, 2015, at the request of the State. (Pet. Ex. A at 5).

On March 17, 2015, Amoline appeared for the case review and Respondent passed the matter until May 19, 2015, for a probation revocation

hearing. (Pet. Ex. A at 5). On April 3, 2015, Respondent suspended the probation term. (Pet. Ex. A at 5).

Amorine failed to appear for the May 19, 2015 revocation hearing. (Pet. Ex. A at 5). Respondent passed the matter until June 16, 2015, and authorized Amorine to perform community service at \$7.50 per hour towards his court costs. (Pet. Ex. A at 5).

To allow Amorine additional time to comply with his probation conditions, Respondent passed the matter on June 16, 2015, and again on July 21, 2015. (Pet. Ex. A at 5–6). On August 18, 2005, Amorine appeared in person and with counsel. (Pet. Ex. A at 6). Respondent appointed a public defender for Amorine and scheduled a probation revocation hearing for September 22, 2015. (*Id.*).

On September 22, 2015, Amorine appeared in person and with counsel. (Pet. Ex. A at 6–7). At that time, Amorine’s counsel asked Respondent to discharge Amorine from his probation term because, counsel argued, that Amorine’s probation term had expired. (Petition at 3, 10). Respondent denied the oral motion and scheduled the revocation hearing for October 20, 2015. The State filed its motion to revoke. (Pet. Ex. A at 6).

On October 14, 2015, Amorine filed a petition for a writ of prohibition, or in the alternative, a writ of mandamus against Respondent in *State ex rel.*

Amorine v. Parker, SD34171. (Pet. Ex. E). The Missouri Court of Appeals denied the petition on October 16, 2015. (Pet. Ex. E).

This action follows.

ARGUMENT

Standard of review

Prohibition generally lies to prevent commission of a future act, not to undo an act already performed. *State ex rel. Missouri Commission of Public Service v. Joyce*, 258 S.W.3d 58, 60 (Mo. 2008). Prohibition is discretionary writ; there is no right to have one issued. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. 2001). This Court may issue a writ of prohibition to remedy an excess of authority, jurisdiction or an abuse of discretion if a lower court lacks the power to act as intended. *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. 2014). To prevail, the petitioning party must demonstrate that the lower court exceeded its authority and overcome “the presumption of right of action in favor of the trial court’s ruling.” *State ex rel. Dixon v. Darold*, 939 S.W.2d 66, 69 (Mo. App. S.D. 1997).

Respondent had authority to conduct a revocation hearing in October 2015, because Amorine's probation term had not yet expired. (Responds to Point I).

A. Probation terms are controlled by statute.

The legislature has extended to the judiciary the ability to lessen the impact of a criminal sentence by way of probation. *State v. Henry*, 88 S.W.3d 451, 455 (Mo. App. W.D. 2002). A trial court's authority with respect to probation is dependent upon statutory authorization. *State ex rel. Popowich v. Conley*, 967 S.W.2d 294, 296 (Mo. App. W.D. 1998); *State ex rel. McCulloch v. Schiff*, 852 S.W.2d 392, 395 (Mo. App. E.D. 1993). Generally, the court's authority to revoke probation extends only until the probation term expires, unless otherwise permitted by law. §559.036.8 RSMo.¹; *Strauser*, 416 S.W.3d at 801. When the probation term ends, so does the court's authority to revoke probation. *Strauser*, 416 S.W.3d at 801.

Sections 217.703, 559.016, and 559.036 govern the duration of probation terms. A probation term begins the day it is imposed. §559.036.1 RSMo. A felony probation term cannot exceed five years, unless extended by one additional year by the court. §§559.016.1(1)(1), 559.016.3, 559.036.2

¹ All references shall be to Missouri Revised Statutes, Supplement 2012, unless otherwise noted.

RSMo. However, total time on a felony probation term, including an extension, may not exceed six years. §§559.016.3, 559.036.2 RSMo. A probation court may also discharge a probationer before his term expires, and the division of probation and parole² (“division”) may modify a probation term based on the accrual of earned compliance credits. §§559.016.1, 559.016.2, 217.703.7 RSMo.

B. Earned compliance credits shorten a probation term.

Before 2012, a probation term would be the full term imposed unless modified by the probation court. §217.703 and 559.036 RSMo. But, in 2012, while Amorine was on supervision, the General Assembly enacted §217.703, the earned compliance credit statute, which became effective on August 28, 2012. Although Amorine’s probation term was imposed before the statute’s enactment, he may receive the statute’s benefit. *See* §217.703.3 RSMo. The award of earned compliance credits is an administrative function of the division of probation and parole, but the division’s authority is limited by the requirements set forth in §217.703.

² The division of probation and parole is one of the four divisions that make up the Missouri Department of Corrections. §217.015 RSMo. The division is responsible for carrying out the requirements of the earned compliance credit statute.

If an offender qualifies for earned compliance credits, his probation term³ is shortened based on the amount of earned compliance credits the offender receives. §§559.016.1, 559.016.2, 217.703 RSMo. Essentially, earned compliance credits shorten an offender's probation term by thirty days for each calendar month the offender is in compliance,⁴ but an offender must serve at least two years on probation before he can be discharged. §217.703.7 RSMo. Earned compliance credits are not absolute.

This statute also controls when earned compliance credits cannot be awarded, when credits are suspended, and when credits must be rescinded. Subsection 5 of §217.703 states:

Credits shall not accrue during any calendar month in which a violation report has been submitted or a motion to revoke or motion to suspend has been filed, and shall be suspended pending the outcome of a hearing, if a hearing is held. If no hearing is

³ Section 217.703 applies to any term of supervision by the Parole Board including probation, parole or conditional release. §217.703.3 RSMo.

⁴ "Compliance" is defined as "the absence of an initial violation report submitted by a probation or parole officer during a calendar month, or a motion to revoke or motion to suspend filed by a prosecuting or circuit attorney, against the offender." §217.703.3 RSMo.

held or the court or board finds that the violation did not occur, then the offender shall be deemed to be in compliance and shall begin earning credits on the first day of the next calendar month following the month in which the report was submitted or the motion was filed. All earned credits shall be rescinded if the court or board revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036. Earned credits shall continue to be suspended for a period of time during which the court or board has suspended the term of probation, parole, or release, and shall begin to accrue on the first day of the next calendar month following the lifting of the suspension.

The requirements in §217.703.5 are mandatory and cannot be waived by the division or any individual subject to the statute.

C. Amore's probation expires in May 2016.

Amore's original five-year probation term began on May 4, 2011. (Pet. Ex. A). On September 16, 2014, Respondent extended Amore's probation term for an additional year. (Pet. Ex. A at 4; Pet. Ex. B). If Amore received no earned compliance credits, his probation term would expire on May 4, 2017. But Amore is eligible for some earned compliance credits. The question is, how many credits has Amore accrued under §217.703 RSMo.

Months when violation reports were submitted

Amorine cannot accrue earned compliance credits during the months of June 2013, May 2014, and January 2015 because violation reports were submitted to the probation court during each of those calendar months. (Pet. Ex. A at 3, 4); *see* §217.703.5 (“Credits shall not accrue during any calendar month in which a violation report has been submitted...”.)

Months when probation term was suspended

Amorine cannot accrue earned compliance credits during the months of July 2014, August 2014, and September 2014, because Respondent suspended his probation on July 16, 2014, and did not lift the suspension until September 16, 2014. (Pet. Ex. A at 4); *see* §217.703.5 (“[e]arned credits shall continue to be suspended...during which the court...has suspended the term of probation...and shall begin to accrue on the first day of the next calendar month following the lifting of the suspension.”) Nor can Amorine accrue earned compliance credits beginning in April 2015 through today, because Respondent suspended the probation term on April 3, 2015 and has not lifted the suspension. (Pet. Ex. A at 5).

Months pending the outcome on the violation reports

Amorine cannot receive earned compliance credits from June 2013, through September 2014, because a hearing was ultimately held on his pending violations on September 16, 2014, where Amorine appeared and

admitted that he violated the conditions of his probation, and Respondent found that the violations listed in the June 2013 and May 2014 reports *did* occur. (Pet. Ex. A at 4); (Pet. Ex. B).

Once the June 2013 violation report was filed, Amorine's earned compliance credits were "suspended pending the outcome of a hearing" because a hearing was subsequently held. §217.703.5 RSMo. This suspension remained in effect until September 16, 2014, when a hearing on this violation, as well as the violation cited in the May 2014 report, was held. Because a hearing was held and Respondent found that the violations cited in the June 2013 and May 2014 reports occurred, Amorine could not receive earned compliance credits from June 2013 until September 2014.

Months Amorine can receive earned compliance credit

Amorine started accruing earned compliance credits beginning on October 2012.⁵ §217.703.3 RSMo. Amorine continued to accrue earned

⁵ It is unclear whether Amorine would receive earned compliance credit for the month of September 2012 in October 2012, or if he could not begin to receive earned compliance credits *until* October 2012. Respondent takes no position on this question of interpretation. Providing Amorine with this benefit would mean that he could receive 30 days of credit on October 2012 as a result of his compliance in September 2012.

compliance credits for each month following October 2012, until the first violation report was submitted June 2013. *See* §217.703.1, 217.703.3, 217.703.5 RSMo. Amorine began accruing earned compliance credits again in October 2014. He continued to accrue earned compliance credits during each following month until the violation report was submitted to the probation court in January 2015.

In short, when §217.703.5's requirements are applied, Amorine is only eligible for 12 months of earned compliance credits, or 360 days – not 25 months, or 750 days, as determined by the division.⁶ Specifically, Amorine may only receive earned compliance credits for the months of September 2012, October 2012, November 2012, December 2012, January 2013, February 2013, March 2013, April 2013, May 2013, October 2014, November 2014, and December 2014.

⁶ For ease of this Court and the parties, Respondent has prepared a chart that helps illustrates the various months Amorine was and was not eligible for earned compliance credits. (Resp. Appendix at 1). This chart also depicts which months the division determined Amorine was eligible.

D. Amoline's arguments are refuted by the record and fail as a matter of law.

Amorine argues that he has accrued 750 days of earned compliance credits relying on the division's interpretation. However, the division's determination conflicts with §217.703.5's requirements.

First, the division determined that Amorine was *not* eligible for earned compliance credits during the months of May 2013, April 2014, and December 2014 due to "violation reports." (Resp. Ex. 5). Presumably, this notation reflects the division's interpretation of when the violation reports were "submitted" under §217.703.5. However, in the context of a probation matter, the plain and ordinary meaning of the word "submitted" should be when the violation report or the motion is filed with the probation court. However, because the division awarded Amorine with earned compliance credits during June 2013, May 2014, and January 2015, when the violation reports were submitted, the determination regarding these three months do not change the division's total number of earned compliance credits.

It is the remaining dispute months from July 2013 until September 2014 that substantially impact the total number of earned compliance credits that Amorine may receive. The division determined that Amorine could receive credit for at least 11 of those months from July 2013 until June 2014. (Resp. Ex. 5). Amorine argues that he should receive earned compliance

credits for these months for two reasons. First, he contends he can receive credit because “the statute clearly states that the credits begin to accrue on the first day of the next calendar month following the month in which the report was submitted or the motion was filed” and “the credits do not stop during the entire time a violation or motion to revoke is pending.”⁷ (Brief at 8). Second, he argues that he can receive these credits because “no hearing was held” on September 16, 2014, although he concedes that he appeared before Respondent on that date and admitted to his violation. (Id.). This Court should reject both arguments.

⁷ Amorine also suggests that this Court should reject Respondent’s argument because Amorine’s earned compliance credits have not been rescinded. But, Respondent does not claim Amorine’s earned compliance credits were *rescinded* due to the September 16, 2014, hearing and violation finding. (Brief at 9). A rescission of earned compliance credits is controlled by the plain language of §217.703.5 RSMo. Under the statute, a rescission of all earned compliance credits can only occur under two circumstances: (1) a court revokes an offender’s probation term; or (2) a court orders that the offender placed in a Department of Corrections 120-day program under §559.036.4. Neither circumstance has occurred here.

Amorine's argument ignores the plain language of the statute

Amorine's argument ignores the plain language of §217.703. "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. 2009) (internal quotation omitted). "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity." *Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood*, 107 S.W.3d 235, 239 (Mo. 2003). "The corollary to this rule is that a court should not interpret a statute so as to render some phrases mere surplusage." *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. 2009). "[A] sentence should not be given a meaning that thwarts a section; a clause should not undermine a sentence." *Id.*

Section 217.703.5 states that "[c]redits shall not accrue during any calendar month in which a violation report has been submitted ... and shall be suspended pending the outcome of a hearing, if a hearing is held." Although Amorine is correct that offenders may be able to recoup some of this suspended time period, offenders can only do so "[i]f no hearing is held or the court or board finds that the violation did not occur...". §217.703.5 RSMo. This provision is not applicable to Amorine because a hearing was held on

Amorine's violations and Respondent did find that the violation occurred. Amorine's interpretation treats these requirements as mere surplusage.

Respondent held a hearing on Amorine's violations

Amorine's second argument fails because a hearing took place. Amorine had notice of the violations and an opportunity to be heard on the violations at the September 16, 2014 appearance. (Pet. Ex. B; Pet. Ex. A at 4). Amorine appeared before Respondent on that date and admitted that he violated the conditions of his probation. (Pet. Ex. B; Pet. Ex. A at 4). At the end of this hearing, Respondent found that Amorine violated his probation because he "failed to pay court costs." (Pet. Ex. B). Amorine received all the due process that was required and makes no argument claiming otherwise. *See Abel v. Wyrick*, 574 S.W.2d 411, 417 (Mo. 1978). Respondent's order represents a judicial finding that a hearing took place. Amorine ignores Respondent's order and suggests that no hearing took place on September 16, 2014, because the docket entries from July 16, 2014 state "[c]ause passed to September 16, 2014 at 1:00 p.m. for setting of probation revocation hearing." (Pet. Ex. A at 4); (Brief at 8). Simply because a *prior* docket entry states that a revocation hearing would be scheduled on September 16, 2014, that text is not proof that a revocation hearing did not take place on September 16, 2014.

Even if no hearing was held, Amorine would still be unable to accrue credits. Amorine does not dispute that Respondent did find that the violation

occurred as a result of Amordine's admission. Because Respondent did find that a violation occurred, Amordine cannot accrue credits. The statute states "[i]f no hearing is held *or the court or board finds that the violation did not occur...*". §217.703.5 RSMo. (Emphasis added). Use of the word "or" "ordinarily denotes an alternative to the preceding phrase." *Johnson v. Missouri Bd. of Probation and Parole*, 359 S.W.3d 500, 506 (Mo. App. W.D. 2012).

Amordine's argument would lead to absurd results. A probationer can waive a formal revocation hearing and admit to the violation. Under Amordine's theory probationers who chose to waive a revocation hearing would be eligible to accrue earned compliance credits during the time period the violation was pending, but probationers who dispute the violation and choose to have a hearing to challenge the State's evidence would be penalized and unable to receive earned compliance credits. This construction is not supported by the language of the statute, would lead to unreasonable results, and ultimately frustrate the purpose of the statute – to award probationers who *comply* with their conditions of probation.

*This Court can determine whether earned compliance credits
were properly calculated*

Amordine suggests that this Court cannot determine whether his earned compliance credits were calculated in accordance with Missouri law because

§217.703.8 states that the award or rescission of any credits is not subject to appeal or post-conviction relief. This language, however, does not prohibit this Court from reviewing the appropriate calculation of earned compliance credit to determine when a probation term ends, which it must do here. When a statutory right is at issue, a court must analyze the statute or statutes under which the relator claims the right. *State ex rel. Hodges v. Asel*, 460 S.W.3d 926, 927 (Mo. 2015). Therefore, this question is properly before this Court and the Court must decide it in order to determine when Respondent's authority expires.

Amorine's remaining arguments are not relevant to this inquiry

Amorine's remaining arguments challenge Respondent's ability to retain authority after a probation term has expired. (Brief at 6, 10–12). Respondent does not concede any of the arguments Amorine advances, but notes that this Court need not resolve those matters because Amorine's probation term did not expire before October 2015 and may not expire until May 2016. Respondent has not exceeded his statutory authority over Amorine's probation term.

CONCLUSION

Because Amorine's probation term has not yet expired, Respondent is authorized to conduct a probation revocation hearing as a matter of law. This Court should quash the preliminary writ and deny the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,120 words, excluding the cover and certification, as determined by Microsoft Word 2010 software, and that a copy of this brief was sent through the electronic filing system on January 8, 2016 to:

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